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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN M. LACERDA, Defendant and Appellant.	H030026 (Santa Clara County Super. Ct. No. FF407302)

In exchange for dismissal of other charges and enhancements and a sentencing range of no less than 11 years and no more than 15 years, defendant Steven M. Lacerda pleaded guilty to (1) gross vehicular manslaughter, (2) driving under the influence of alcohol--blood alcohol level of .08 percent, and (3) hit and run resulting in serious injury or death. He also admitted that he had (1) personally inflicted great bodily injury, (2) suffered a prior conviction of driving under the influence, and (3) fled the scene of a hit and run. The plea bargain, as recited by the trial court at the change-of-plea hearing, did not mention the fines required by Penal Code sections 1202.4 (restitution-fund fine) and 1202.45 (parole-revocation fine).[1] However, at the same time as the hearing, defendant signed and initialed an advisement of rights, waiver, and plea form that did mention the fines. The trial court sentenced defendant to the maximum term permitted under the plea agreement, which involved the use of a 10-year upper term for the manslaughter

[1] Further unspecified statutory references are to the Penal Code.

conviction. It also imposed a restitution-fund fine of $9,000 and a suspended parole-revocation fine in the same amount. Defendant thereafter filed an amended notice of appeal in which he appeals upon a ground that "arose after entry of pleas of guilty and does not challenge the validity of the pleas." He did not seek, nor was he granted, a certificate of probable cause. (§ 1237.5.) The first issue that defendant raises on appeal relates to the trial court's authority to impose an upper term sentence in light of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). This argument is not cognizable on appeal because defendant did not obtain a certificate of probable cause. The second issue that defendant raises is a claim that the trial court violated the plea bargain by imposing the fines. We affirm the judgment.

BACKGROUND

Defendant signed the advisement of rights form, which denoted a sentence "11 yr. bottom 15 yr. top." In reciting the terms of the agreement at the change-of-plea hearing, the trial court stated that, "The sentencing understanding is that he'll receive no less than 11 years and no more than 15 years in state prison." It then asked defendant, "Is that what you want to do?" Defendant responded, "Yes, sir." The following colloquy then occurred.

"THE COURT: [Defense counsel], did you execute a plea form, or did you help [defendant] execute the form?

"[Defense counsel]: I read the form in its entirety except for the matters which did not relate to his case and crossed out those boxes, prior to his initialing and signing the form.

"THE COURT: I've been handed a waiver form. Are these your initials and signature on the form?

"THE DEFENDANT: Yes, sir.

"THE COURT: Did you go over the form carefully with your attorney . . . before you signed it?

"THE DEFENDANT: Yes.

"THE COURT: Do you have any questions for me or for your attorney concerning anything, anything concerning the case?

"THE DEFENDANT: No, sir."

Provision 42 of the form signed by defendant states: "I understand that there will be a mandatory restitution fund fine of not less than $200 nor more than $10,000, and if I am being sentenced to State prison that there will be an additional equal amount imposed but stayed." Defendant placed his initials next to provision 42.

At the sentencing hearing, defense counsel asked the court to impose a midterm sentence, which would calculate to the minimum 11-year term, rather than the upper term recommended by the prosecution, which would calculate to the 15-year term. Defense counsel did not, however, argue that the trial court did not have the authority to impose an upper term sentence absent jury findings that one or more aggravating factors existed. (*Blakely*, *supra*, 542 U.S. 296.)[2] In sentencing defendant to the upper term, the trial court also ordered the following, which was consistent with the probation officer's recommendation: "There's a $9,000 restitution fine using the statutory formula. I imposed an additional $9,000 restitution fine suspended pursuant to [section] 1202.45 of the Penal Code pending successful completion of your parole."

BLAKELY

Section 1237.5 provides, "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed

[2] The Supreme Court decided *Blakely* on June 24, 2004. The negotiated disposition in this case took place on January 9, 2006, and sentencing happened on March 6, 2006.

under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

We are required to strictly apply the certificate requirements of section 1237.5. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1097 [holding that "section 1237.5 . . . ha[s] been applied in a strict manner," and condemning relaxed application of section 1237.5's requirements despite argument that defendant denied relief on direct appeal will seek same relief by petitioning for a writ of habeas corpus]; *People v. Panizzon* (1996) 13 Cal.4th 68, 89, fn. 15 (*Panizzon*) ["condemn[ing]" the practice of addressing the merits of contentions despite failure to comply with section 1237.5, because "the purposes behind section 1237.5 will remain vital only if appellate courts insist on compliance with its procedures"].) As noted in *People v. Cole* (2001) 88 Cal.App.4th 850, 860, footnote 3, "strict application of section 1237.5 works no undue hardship on defendants with potentially meritorious appeals. The showing required to obtain a certificate is not stringent. Rather, the test applied by the trial court is simply 'whether the appeal is clearly frivolous and vexatious or whether it involves an honest difference of opinion.' "

An exception to the certificate requirement exists for challenges to " 'issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.' " (*People v. Shelton* (2006) 37 Cal.4th 759, 766 (*Shelton*).) However, this exception will only apply if the challenge on appeal is not "*in substance* a challenge to the validity of the plea." (*Panizzon*, *supra*, 13 Cal.4th at p. 76; see, e.g., *Shelton*, *supra*, 37 Cal.4th at p. 766 [sentence challenge based on section 654's prohibition against multiple punishment is a challenge that affects validity of plea].)

" '[A] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself' and thus requires a certificate of probable cause." (*Shelton*, *supra*, 37 Cal.4th at p. 766, quoting *Panizzon*,

supra, 13 Cal.4th at p. 79.) "[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term." (*Shelton, supra,* 37 Cal.4th at p. 768.) "[A] provision recognizing the defendant's right to 'argue for a lesser term' is generally understood to mean only that the defendant may urge the trial court to exercise its sentencing discretion in favor of imposing a punishment that is less severe than the maximum punishment authorized by law." (*Ibid.*) "Of course, a prosecutor and a defendant may enter into a negotiated disposition that expressly recognizes a dispute or uncertainty about the trial court's authority to impose a specified maximum sentence--because of Penal Code section 654's multiple punishment prohibition or for some other reason--and preserves the defendant's right to raise that issue at sentencing and on appeal." (*Id.* at p. 769.) To the extent some ambiguity exists regarding the meaning of the parties' agreement, a court should "begin with the language of the plea agreement concerning sentencing, as the trial court recited it on the record" (*id.* at p. 767), since "[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*Ibid.*)

People v. Bobbit (2006) 138 Cal.App.4th 445, is directly on point. There, the defendant appealed after he was sentenced to the maximum term permitted under his plea agreement. The plea agreement failed to preserve, either at sentencing or for appeal, the issue that the trial court did not have the authority to impose an upper term sentence in the absence of a jury finding of one or more of the aggravating circumstances. The defendant, however, had failed to obtain a certificate of probable cause. The court concluded: "On this record, we conclude as a matter of law that the plea agreement did not preserve, either at sentencing or on appeal, the issue that the court did not have the authority to impose an upper term sentence in the absence of a jury finding of one or

more aggravating circumstance(s). Without a certificate of probable cause, the appeal must be dismissed." (*Id.* at p. 448, fn. omitted.)

We disagree with *People v. Cuevas* (2006) 142 Cal.App.4th 1141, 1150, a case defendant cites that conflicts with *Bobbit*. *Cuevas* essentially holds that, when the sentencing lid is the maximum under the charges pleaded to, a certificate is not required because there is no "lid." In our view, there is a sentencing lid when charges are dismissed in exchange for a maximum even if the maximum is the maximum under the charges pleaded to.

Defendant disagrees with *Bobbit* and contends that his appeal is not prohibited under *Shelton* because he is not making the argument that the trial court lacked sentencing authority to impose the lid sentence. Instead, defendant urges that "the procedure used to get to the sentence was illegal."

We conclude that the analytical framework announced in *Shelton* requires rejection of defendant's argument. First, by urging that the trial court followed illegal procedure, defendant is necessarily urging that the trial court could not lawfully impose the challenged sentence rather than that it abused its discretion in making one lawful sentence choice instead of another lawful sentence choice. And second, the application of "general contract principles" to defendant's negotiated plea reveals that his plea agreement embodies a mutual understanding that the upper term could lawfully be applied. (*Shelton*, *supra*, 37 Cal.4th at pp. 767-768.) Consequently, defendant's appellate contention is, in substance, a challenge to his negotiated plea and requires a certificate of probable cause.

RESTITUTION FINES

The statutory bases for the fines at issue are sections 1202.4 and 1202.45. Section 1202.4, subdivision (a)(3)(A) mandates judicial imposition of a restitution-fund fine whenever a person is convicted of a crime. The trial court shall impose the fine "unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on

the record." (§ 1202.4, subd. (c).) In the absence of extraordinary reasons, the minimum fine the court must impose is $200. (*Id*. subd. (b)(1).) The court has discretion to impose a fine of up to $10,000. The general guideline is that the fine should be "commensurate with the seriousness of the offense." (*Ibid.*) Section 1202.45 mandates an additional fine duplicating the amount of the restitution fine. This fine takes effect only if parole is revoked.

Relying on *People v. Walker* (1991) 54 Cal.3d 1013, defendant asserts that any restitution fine above the statutory minimum of $200 violated his plea bargain because the terms of his plea bargain did not contain any reference to the fines.

We extensively reviewed the principles that govern plea bargains and restitution fines in *People v. Dickerson* (2004) 122 Cal.App.4th 1374, *People v. Knox* (2004) 123 Cal.App.4th 1453, and *People v. Sorenson* (2005) 125 Cal.App.4th 612. We need not repeat that discussion here.

As we explained in *Knox*, plea agreements have "contractual qualities." (*People v. Knox*, *supra*, 123 Cal.App.4th at p. 1459; see also, e.g., *Shelton*, *supra*, 37 Cal.4th at p. 767 ["plea agreement is a form of contract"].) Plea agreements also have "a constitutional dimension." (*People v. Knox*, *supra*, 123 Cal.App.4th at p. 1459.) "A criminal defendant's constitutional due process right is implicated by the failure to implement a plea bargain according to its terms." The question presented in this case concerns the contractual aspect of plea agreements: at issue here "is whether specific terms or consequences became part of the plea bargain." (*Ibid.*)

Here, we conclude that the restitution fines did become part of defendant's plea agreement. At the change of plea hearing, the court and the parties orally identified the agreed prison-term range. But other aspects of the plea were reflected in the written waiver form and became part of the bargain as well. As relevant here, the restitution fines of between $200 and $10,000 were reflected in provision 42 of the waiver form.

Defendant entered his plea only after confirming his understanding of that form. This incorporated into the plea the terms set forth in the form.

Nor are we persuaded to a different conclusion by the fact that the court imposed a $9,000 fine, much more than the statutory minimum. As stated in *Knox*: "The fact that the precise amount of the fine was not specified prior to the entry of defendant's plea does not change the analysis. To the contrary, it represents defendant's implicit recognition that the amount of the fine will be left to the sentencing court's discretion." (*People v. Knox*, *supra*, 123 Cal.App.4th at p. 1461; see *People v. Dickerson*, *supra*, 122 Cal.App.4th at p. 1385.) As fully explained in this court's recent cases, our conclusion does no violence to *Walker*. (See *People v. Sorenson*, *supra*, 125 Cal.App.4th at pp. 618-619; *People v. Knox*, *supra*, 123 Cal.App.4th at pp. 1461-1462; *People v. Dickerson*, *supra*, 122 Cal.App.4th at pp. 1384-1385.) We therefore reject defendant's contrary contention.

Our conclusion is confirmed by the absence of objection to the recommendation in the probation report that restitution fines be imposed, coupled with the absence of objection when the trial court actually imposed the fines. We mention the lack of objection in this context not to show waiver but to demonstrate that no one in the trial court seemed to think that imposition of the fines violated the terms of the plea bargain.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.